UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAVID SCOTT, JEREMY CERDA, OSMAN AK, MERUDH PATEL, GREGORY HARDY, and LARRY WILLIAMS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FORMER WARDEN HERMAN E. QUAY, FACILITIES MANAGER JOHN MAFFEO, and THE UNITED STATES OF AMERICA,

Defendants.

Civil Action No.: 19-cv-1075

(Brodie, J.)
(Gold, M.J.)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Defendants United States of America, Herman Quay, and John Maffeo ("Defendants") by their attorney, Richard P. Donoghue, United States Attorney for the Eastern District of New York, Seth D. Eichenholtz, Sean P. Greene, and Shana C. Priore, Assistant United States Attorneys, of counsel, submit this memorandum of law in support of their motion pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the Amended Complaint for lack of subject matter jurisdiction and failure to state a claim for which relief may be granted.

Plaintiffs are former federal prisoners who were housed at the Federal Bureau of Prisons' (BOP) Metropolitan Detention Center in Brooklyn, New York (MDC), including during a one-week period from January 27 until February 3, 2019, when the MDC experienced a partial power outage. Plaintiffs allege that during this period, those detained at the facility experienced substandard conditions, including a lack of light, heat and proper medical care. Plaintiffs bring claims against defendant Herman Quay, the former Warden of MDC, and John Maffeo, the Facilities Manager at MDC, under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they violated plaintiffs' rights under the Fifth and Eighth Amendments to the Constitution. Plaintiffs also bring a cause of action for negligence against the United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq*. ("FTCA"). ECF Dkt. 29 (Am. Compl.), ¶¶ 370-80.

The Amended Complaint is ripe for dismissal because: 1) as against defendants Quay and Maffeo, there is no recognized *Bivens* cause of action in the contexts presented here, and the Court should not create one; 2) as against defendant Maffeo, it fails plausibly to allege that he was personally involved in conduct that violated plaintiffs' constitutional rights; 3) the Court lacks jurisdiction over plaintiffs' allegations of negligence because plaintiffs failed to properly exhaust

their administrative remedies prior to filing suit; and 4) the Court lacks subject matter jurisdiction over plaintiffs' allegations of negligence, because the alleged negligent acts or omissions fall within the FTCA's Discretionary Function Exception, 28 U.S.C. § 2680(a). Accordingly, the Court should dismiss the Amended Complaint in its entirety.

STATEMENT OF FACTS[1]

All of plaintiffs' claims pertain to the conditions of their incarceration at the MDC during a one-week period last year, when the facility experienced a partial power outage. ECF Dkt. 1, p. 8. On Sunday, January 27, 2019, there was a major electrical fire in the mechanical room of the West Building that fully destroyed one of three electrical distribution systems (known as the "Priority 3" system) that supplied power to the entire building.[2] Am. Compl., ¶ 45; Exhibit A to the Declaration of Seth D. Eichenholtz ("Eichenholtz Decl."), Declaration of Herman Quay, dated February 15, 2019, filed in *Federal Defenders of New York v. Federal Bureau of Prisons, et al.*, 19-CV-660 (MKB)(SMG) ("Quay Decl."), ¶ 19; Eichenholtz Decl., Exhibit B, Declaration of John Maffeo, dated February 15, 2019, filed in *Federal Defenders of New York v. Federal Bureau of Prisons, et al.*, 19-CV-660 (MKB)(SMG) ("Maffeo Decl."), ¶ 9. As a result, only the most essential systems (*e.g.*, security, fire and health equipment, electrical doors, and emergency lighting), which were powered by the two undamaged power distribution systems, continued to function normally. Am. Compl., ¶ 46; Maffeo Decl., ¶¶ 4, 11.

[1] Though defendants dispute many of plaintiffs' factual allegations, the Court must assume their truth for the purpose of defendants' Rule 12(b)(6) motion as to plaintiffs' *Bivens* claims. However, in deciding defendants' Rule 12(b)(1) motion, the Court need not assume the truth of the allegations and can rely on evidence outside the pleadings. *See* Standard of Review, Point B, *infra*.

[2] MDC Brooklyn is comprised of two buildings, commonly referred to as the "East Building" and the "West Building." The partial power outage only affected the West Building.

The fire and resulting partial power outages caused significant disruption to the safe and orderly operation of the facility, as electronic screening equipment in the lobby was unavailable, and lighting was only provided by emergency lights in the housing units, office areas, and visiting room. Quay Decl., ¶ 21. The institutional disruptions largely persisted until power was fully restored on Sunday, February 3, 2019. *Id.*[3]

Plaintiffs claim that, as a result of the partial power outage, they experienced a lack of light, heat and hot water, excessive periods of lockdown in cells,[4] and limited medical care. Am. Compl., ¶¶ 258-300. While a subsequent investigation corroborated some of plaintiffs' allegations regarding the conditions at MDC during the period at issue, many others, such as a lack of any heat or any medical care, are not accurate. *See generally* OIG Report, *available at*, https://oig.justice.gov/reports/2019/e1904.pdf (last visited Feb. 12, 2020).

STANDARDS OF REVIEW

A. LEGAL STANDARD GOVERNING MOTIONS UNDER FED. R. CIV. P. 12(B)(6)

Defendants Quay and Maffeo move to dismiss the *Bivens* claims against them pursuant to Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chern. Co.*, 517 F.3d 104, 115 (2d Cir. 2008) (citation omitted). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quoting *Bell Atl. Corp. v.*

[3] A timeline of the events of the electrical fire and subsequent partial power outage can be found on page 10 of the Department of Justice's Office of Inspector General's report regarding these events. *See Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impacts on Inmates*, Sept. 2019 ("OIG Report"), *available at*, https://oig.justice.gov/reports/2019/e1904.pdf (last visited Feb. 12, 2020).

[4] When the institution or a housing unit is "locked down," inmates are secured in their cells.

Twombly, 550 U.S. 544, 570 (2007)). This "plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citation omitted).

The Supreme Court in *Iqbal* summarized the "[t]wo working principles [that] underlie" *Twombly*: "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*. "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. at 679. Applying this second principle "will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. Thus, the Supreme Court set out a "two-pronged" approach for courts deciding a motion to dismiss:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. . . . When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id.

The Second Circuit has reaffirmed that "[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Communications, Inc. v. Shaar Fund, Ltd*., 493 F.3d 87, 98 (2d Cir. 2007) (citing *Twombly*, 550 U.S. 444 (2007)). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Nwaokocha v. Sadowski*, 369 F. Supp. 2d 362, 366 (E.D.N.Y. 2005) (Weinstein, J.) (citation omitted).

B. LEGAL STANDARD GOVERNING MOTIONS UNDER FED. R. CIV. P. 12(B)(1)

Defendant United States moves to dismiss the FTCA claim pursuant to Fed. R. Civ. P. 12(b)(1). When a motion to dismiss pursuant to Rule 12(b)(1) is brought, it is the court's duty to resolve disputed jurisdictional facts. *See Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d

697, 700 (2d Cir. 2000) ("failure of subject matter jurisdiction is not waivable and may be raised at any time by a party or the court *sua sponte*"); *Cargill Int'l S.A. v. MIT Pavel Dyneko*, 991 F.2d 1012, 1019 (2d Cir. 1993). The Court may fulfill its duty by reference to evidence outside the pleadings. *See Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000).

A claim is properly dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); Fed. R. Civ. P. 12(b)(1). In resolving a challenge to subject matter jurisdiction, the Court does not draw inferences in plaintiff's favor. *See Newson-Lang v. Warren Int'l*, 129 F. Supp. 2d 662, 665 (S.D.N.Y. 2001). Furthermore, on a motion pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the ultimate burden of proving the court's jurisdiction by a preponderance of the evidence. *See Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002).

ARGUMENT

POINT I

PLAINTIFFS' *BIVENS* CLAIMS FAIL TO STATE A CAUSE OF ACTION FOR WHICH RELIEF MAY BE GRANTED

Plaintiffs' *Bivens* claims are ripe for dismissal on the ground that the Supreme Court has not recognized *Bivens* remedies for the constitutional violations alleged. *See, e.g., Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017); *Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 57 (E.D.N.Y. 2017) (Cogan, J.), *aff'd*, 755 F. App'x 67 (2d Cir. 2018) (summary order). Further, the Supreme Court has cautioned against the creation of new remedies, or the expansion of remedies available, under *Bivens*. *See Abbasi*, 137 S.Ct. at 1848; *Rivera v. Samilo*, 370 F. Supp. 3d 362, 367 (E.D.N.Y. 2019) (Irizarry, Ch. J.); *Ojo v. United States*, 364 F. Supp. 3d 163, 170 (E.D.N.Y. 2019) (Ross, J.).

For the reasons that follow, the Court should find that plaintiffs' claims present new contexts for which the Court should not extend a *Bivens* remedy due to the existence of alternative remedial processes and other special factors counseling hesitation.

A. THE SUPREME COURT'S *ABBASI* DECISION REAFFIRMED THAT THE EXTENSION OF *BIVENS* TO NEW CONTEXTS IS DISFAVORED

"*Bivens* is a judicially created remedy that enables individuals to bring an action in federal court against federal officers who have invaded their constitutional rights." *Tyler v. Dunne*, No. 16-cv-2980, 2016 WL 4186971, at *2 (E.D.N.Y. Aug. 8, 2016) (Mauskopf, J.) (citations omitted). The decision to recognize a *Bivens* remedy in a particular case must "represent a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Thus, a plaintiff alleging a constitutional violation is not "automatic[ally] entitle[d]" to a *Bivens* remedy. *Benzman v. Whitman*, 523 F.3d 119, 125 (2d Cir. 2008); *Wilkie*, 551 U.S. at 549 ("[I]n most instances, we have found a *Bivens* remedy unjustified."). Indeed, as the Supreme Court announced in *Abbasi*, expanding the *Bivens* remedy is now "a 'disfavored' judicial activity." 137 S. Ct. at 1857.

In *Bivens*, the Supreme Court first recognized a damages remedy to redress Webster Bivens' claim that several Federal Bureau of Narcotics agents entered his apartment without a warrant, arrested him, and searched his apartment. 403 U.S. at 389. The Court determined that a damages cause of action arising from the agents' warrantless search and seizure was the appropriate remedy for their invasion of his "personal interests in liberty." *Id.* at 395. Since then, the Supreme Court has extended *Bivens* to only two other contexts – a federal employee's employment discrimination claim for a violation of the Fifth Amendment's Due Process Clause, and an alleged Eighth Amendment violation by prison officials as a result of their deliberate indifference to a sentenced inmate's known, emergent medical needs. *Wilkie v. Robbins*, 551 U.S.

537, 549-50 (2007) (citing *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)). Since the *Carlson* decision 40 years ago, the Supreme Court has refused to recognize a *Bivens* remedy in any other context. *Abbasi*, 137 S. Ct. at 1855 ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself."); *Minneci v. Pollard*, 132 S. Ct. 617, 622-23 (2012) (collecting and summarizing decisions); *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc); *Rivera*, 370F. Supp. 3d at 367 (the Supreme Court "has made it clear that the only recognized implied rights of action are the narrow situations presented in *Bivens*, *Davis* and *Carlson*").

The Supreme Court has observed that "we have retreated from our previous willingness to imply a cause of action where Congress has not provided one," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70, 73-74 (2001), and has instructed that "courts should not imply rights and remedies as a matter of course, 'no matter how desirable that might be as a policy matter, or how compatible with the statute [or constitutional provision]." *Gonzalez*, 269 F. Supp. 3d at 57 (quoting *Abbasi*, 137 S.Ct. at 1856) (internal citation omitted). This practice of judicial restraint flows from a recognition that "it is a significant step under separation-of-powers principles for a court to determine that it has the authority," in effect, "to create and enforce a cause of action for [money] damages against federal officials," and "it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Doe v. Hagenback*, 870 F.3d 36, 43 (2d Cir. 2017) (quoting *Abbasi*, 137 S. Ct. at 1856).

Specifically, the Supreme Court has held that courts should not recognize a *Bivens* remedy in a new context if (1) there are "special factors counseling hesitation before authorizing" the remedy, or (2) there is an "alternative, existing process for protecting" the constitutional right

asserted by the plaintiff. *Wilkie*, 551 U.S. at 550; *Arar*, 585 F.3d at 572. Thus, if even one of these circumstances is present in a new context, a *Bivens* remedy is not available. *Wilkie*, 551 U.S. at 550, 555-62; *Arar*, 585 F.3d at 574-80.

B. PLAINTIFFS' *BIVENS* CLAIMS ARISE OUT OF NEW CONTEXTS

In *Abbasi*, the Supreme Court announced "[t]he proper test for determining whether a case presents a new *Bivens* context[.]" *Abbasi*, 137 S. Ct. at 1859. It held that "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by [the U.S. Supreme Court, and not the Courts of Appeal], then the context is new." *Id.*; *accord Liff v. Office of Inspector Gen., U.S. Dep't of Labor*, 881 F.3d 912, 919 (D.C. Cir. 2018); *Gonzalez v. Velez*, 864 F.3d 45, 52 (1st Cir. 2017); *Rivera*, 370 F. Supp. 3d at 367 (Post-*Abbasi*, "even where a Court of Appeals had previously found a *Bivens* remedy, that court or a district court must consider whether one is available"). The Court further explained that even "small" differences between a case and a prior Supreme Court case recognizing a *Bivens* remedy can be sufficient to create a new context. *See Abbasi*, 137 S.Ct. at 1865 ("Given this Court's expressed caution about extending the *Bivens* remedy, . . . the new-context inquiry is easily satisfied."). While the Court declined to create an exhaustive list of differences sufficient to create a new context, it cited some examples, including:

> the rank of the officers involved; the constitutional right at issue; . . . the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 1860.

As an initial matter, all claims by plaintiffs Scott and Cerda, who were pre-trial detainees during the period at issue, must arise, if at all, under the Fifth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (allegations of constitutional violations arising from pre-trial detainee's

conditions of confinement analyzed under Fifth Amendment's Due Process Clause); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) ("because as a pre-trial detainee [the plaintiff] was not being "punished," the . . . Eighth Amendment . . . does not apply . . . [and her] claims arise under the . . . Fifth Amendment instead"). But the Supreme Court has never extended *Bivens* to cover any claim brought by a pre-trial detainee under the Fifth Amendment. Nor has it implied a *Bivens* remedy for a convicted – but not yet *sentenced* – prisoner like plaintiff Williams. *Cf. Bell*, 441 U.S. at 527-28 (analyzing distinctions between protections afforded to pretrial detainees and "sentenced prisoners"); *Lareau v. Manson*, 651 F.2d 96, 102 (2d Cir. 1981) (noting different constitutional standards applicable to treatment afforded to pretrial detainees versus "sentenced inmates").

In fact, in the prison context, the Court has implied only one type of *Bivens* remedy: by the estate of a sentenced prisoner under the Eighth Amendment for deliberate indifference to the prisoner's emergent medical condition. *See Carlson*, 446 U.S. at 16 n.1; *Abbasi*, 137 S.Ct. at 1855 (citing *Carlson*). Thus, all claims brought by Scott, Cerda and Williams arise in a new context. *See Abbasi*, 137 S. Ct. at 1864 (finding new context and no *Bivens* remedy because "the constitutional right is different here: *Carlson* was predicated on the Eighth Amendment while this claim was predicated on the Fifth); *Gonzalez*, 269 F. Supp. 3d at 60 (". . . because there is no recognized *Bivens* remedy for [the federal prisoner] plaintiff's Fifth Amendment claim, it follows that this is a new context, which requires an alternative-remedy and special-factors analysis."). Indeed, as discussed above, the Supreme Court expressly held in *Abbasi* that the "constitutional right at issue," was a "meaningful" difference sufficient to render the context new. 137 S.Ct. at 1860.

Likewise, the Supreme Court has never recognized a *Bivens* remedy, whether brought

under the Fifth or Eighth Amendment, with respect to any of plaintiffs' claims relating to the following conditions of confinement over the course of several days to one week: lack of heat, light, hot meals and hot water (Am. Compl., ¶¶ 63, 68, 69, 73, 105, 116, 123, 146-48, 152, 168-69, 192, 200, 202, 233, 239); prolonged detention in cells (*id.*, ¶¶ 69, 84, 90, 93, 114, 145, 198); plumbing disruptions (*id.*, ¶¶ 119, 206); lack of access to e-mail, social telephone calls or television (*id.*, ¶¶ 71, 78, 123, 125, 151, 175, 201, 242), and curtailment of social and attorney visitation (*id.*, ¶¶ 79, 124, 155-57, 209-10, 214, 243-44). *See, e.g., Silva v. Ward*, No. 16-cv-185-wmc, 2019 WL 4721052, *4 (W.D. Wis. Sept. 26, 2019) (collecting cases); *see also Schwarz v. Meinberg*, 761 F. App'x 732, 734 (9th Cir. 2019) (summary order), *cert. denied*, No. 19-5776 (Nov. 4, 2019) (finding new context because prisoner's "conditions of the confinement claim" resembled those brought and rejected in *Abbasi*); *Blackwell v. United States*, No. CV 15-08968 PA (AFM), 2019 WL 6619876, *4 (C.D. Cal. Sept. 16, 2019) (report and recommendation) ("plaintiff's claims under the Eighth Amendment's Cruel and Unusual Punishment Clause arising from allegedly unconstitutional conditions of his confinement present a new *Bivens* context."); *Gonzalez*, 269 F. Supp. 3d at 59-66 (rejecting Fifth and Eighth Amendment claims related to conditions of confinement).

In point of fact, the Supreme Court rejected an attempt by the plaintiffs in *Abbasi* itself to advance *Bivens* claims under the Fifth Amendment based on similar allegations of "harsh [prison] conditions." 137 S.Ct. at 1864. Noting the "significant parallels" between the allegations raised there and those in *Carlson*, the Court nonetheless found that the plaintiffs were seeking "to extend *Carlson* to a new context," and "even a modest extension is still an extension." *Id.* Even assuming, *arguendo*, that plaintiffs could analogize sufficiently the conditions claims presented here to a *Bivens* remedy authorized by the Supreme Court (and defendants maintain they cannot), the

exigencies presented by the fire and partial electrical outage themselves were sufficient to render the context new. *See id*. at 1859-60 ("extent of judicial guidance as to how an officer should respond to the problem or emergency" or "presence of potential special factors that previous *Bivens* cases did not consider" sufficient to make context new). Further, to the extent any of the conditions claims are based on a theory that Quay or Maffeo neglected the condition of the MDC, it is beyond cavil that the Supreme Court has never authorized such a *Bivens* claim.

Arguably, the claims that present the closest analogs to *Carlson* are those based on defendants' alleged denial of, or indifference to, requests for medical care by sentenced prisoner-plaintiff Hardy and convicted (but not yet sentenced) prisoner-plaintiff Williams (Am. Compl., ¶¶ 218, 221, 245, 249-50). Notwithstanding, meaningful differences exist between even these claims and the context in which *Carlson* arose. For starters, as discussed above, Williams' medical claims arise in a new context because he was not a sentenced prisoner at the time of the alleged violations. But the substance of his and Hardy's medical claims also differs meaningfully from those brought in *Carlson*.

Carlson involved a federal inmate with a life-threatening and "chronic asthmatic condition." 446 U.S. at 16 n.1. The plaintiff there claimed that the BOP official defendants were deliberately indifferent to the inmate's needs because they knew about his condition, yet confined him at a particular federal detention center against the contrary "advice of doctors," and despite "being fully apprised of the gross inadequacy" of the center's medical facilities. *Id*. When the inmate suffered an asthmatic attack while in BOP custody, the officials "failed to give him competent medical attention," "administered contra-indicated drugs which made his attack more severe," exacerbated his condition with a "respirator known to be inoperative," and "delayed for too long a time his transfer to an outside hospital." *Id*. The Supreme Court there recognized an

implied Eighth Amendment claim for this "failure to provide medical treatment" that resulted in the inmate's death. *See Abbasi*, 137 S. Ct. at 1859 (citing *Carlson*, 446 U.S. at 16 n.1).

Here, neither Hardy nor Williams – nor any plaintiff – allege, or plausibly could allege, that they had a known, life-threatening condition, experienced a life-threatening emergency, or ever were denied emergent treatment. *Cf.* Am. Compl., ¶¶ 218, 245 (alleging unidentified individuals' failure to deliver or refill Hardy and Williams's medications for chronic but non-emergent conditions); ¶ 250 (alleging that "MDC officers" ignored Williams' request "to see mental health staff").[5] While plaintiffs allege that Hardy "had trouble breathing" during the week at issue (*id.*, ¶ 220), they do not allege that he suffered from asthma, that he ever personally advised defendants of any breathing-related problems (before, during or after the period at issue), or required medication or other treatment for any such problems. Inasmuch as the new-context test is "easily satisfied," *Abbasi*, 137 S.Ct. at 1865, the meaningful differences in plaintiffs' claims here require the Court to find that the context is new. *See Gonzalez*, 269 F. Supp. 3d at 65 (holding that, although the plaintiff's medical claims were close "to the ambit covered by *Carlson* . . . the facts are . . . so dissimilar such that the context is new").

Even if the Court were to find that one or more plaintiffs' medical claims overlapped with the facts of *Carlson* to such an identical degree that the "easily satisfied" new-context test was not met, other meaningful differences inescapably fill any gap, and require the Court to move to the special factors analysis. One such independent difference is "the legal mandate under which the

[5] As discussed above, Scott's claims arise in a new context by dint of his status as a pre-trial detainee. But even if the Court were to undertake a broader comparison of his claims with *Carlson*, it would find additional meaningful differences, *viz.*, plaintiffs do not allege that Scott's skin fungus (which required no more than topical ointment), underarm abscess or hand numbness resulted in any pain, let alone significant adverse health effects. *See* Am. Compl., ¶¶ 86-87. Their failure to so plead also casts doubt on the sufficiency of Scott's *Bivens* claim, even if one were implied. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (a plaintiff must show that the deprivation alleged is objectively, sufficiently serious). In any event, plaintiffs admit that Scott received "medical attention to address his requests" on February 1, 2019, four days after the power outage began. Am. Compl., ¶ 91.

officer was operating." *Abbasi*, 137 S.Ct. at 1860. As an initial matter, defendant Maffeo, as the head of the Facilities Department, is vested with no authority to set institutional policy, render medical treatment or receive or respond to inmate complaints. Thus, his mandate, as a maintenance supervisor, differs meaningfully from that of the prison medical provider defendants and Bureau of Prisons officials sued in *Carlson*. *See Green v. Carlson*, 581 F.2d 669, 671, 676 (7th Cir. 1978) (identifying the defendants as Dr. Benjamin De Garcia and Medical Training Assistant William Walters, in addition to the Director of the BOP and Assistant Surgeon General). Indeed, even Maffeo's title or "rank" as a Facilities Department manager, standing alone, serves as an independent difference sufficient to render the context new as to any claims against him. *See Abbasi*, 137 S.Ct. at 1859-60 (meaningful differences include the "rank of the officers involved"); *Rivera*, 370 F. Supp. 3d at 367 (quoting *Vanderklok v. United States*, 868 F.3d 189, 199-200 (3d Cir. 2017) (even where *Bivens* remedy has been found before, courts "must look at the issue anew in this particular context, . . . and as it pertains to *this particular category of defendants*") (internal quotation marks omitted) (emphasis added).

And while, on the surface, defendant Quay's rank might seem comparable to that of the BOP administration official defendants in *Carlson*, his legal mandate differed meaningfully because the defendants in *Carlson* were tasked with carrying out their duties under normal operating conditions; there was nothing remotely extraordinary about the prison's circumstances there. Rather, the defendants' failures were alleged to have taken place against a backdrop of racial prejudice that undergirded their indifference to the decedent's medical emergency and to the inadequacy of the prison's medical facilities. *See Carlson*, 446 U.S. at 16 n.1. Here, by contrast, the MDC faced an unprecedented operational challenge caused by the dual emergencies of a fire and partial electrical outage. As the Court noted with respect to the prison officials in *Abbasi*, "the

judicial guidance available to this warden, with respect to his supervisory duties, was less developed" in that situation than in *Carlson*. 137 S.Ct. at 1864.

In light of the Supreme Court's caution against extending the nature and extent of claims that may be asserted under *Bivens*, plaintiffs' Eighth Amendment claims here present new contexts, and therefore, require the Court to proceed in the inquiry prescribed by *Abbasi* to determine whether: there are other alternative processes to protect plaintiffs' interests; and other special factors exist that counsel hesitation before implying a new *Bivens* remedy.

C. ALTERNATIVE PROCESSES EXISTED TO PROVIDE REDRESS TO PLAINTIFFS' CLAIMS

Multiple special factors, which must be "[t]aken together" and considered in the aggregate, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), counsel against expanding *Bivens* to plaintiffs' claims. Notably, however, the presence of "alternative, existing process[es]" for challenging allegedly unconstitutional action may "alone" foreclose the extension of *Bivens* to new contexts. *Id*. at 1858 (quoting *Wilkie*, 551 U.S. at 550).

Here, the fact that plaintiffs had other avenues to pursue counsels against extending *Bivens*. *Malesko*, 534 U.S. at 73-74 (finding that other potential remedies counseled against recognizing a *Bivens* action and explaining that, in circumstances where plaintiff had some other potential remedy, the Supreme Court has "consistently rejected invitations to extend *Bivens*"). "If there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Ochoa v. Bratton*, No. 16-cv-2852, 2017 WL 5900552, at *6 (S.D.N.Y. Nov. 28, 2017) (quoting *Abbasi*, 137 S. Ct. at 1858). Indeed, as the Supreme Court remarked in *Abbasi*, "when alternative methods of relief are available, a *Bivens* remedy usually is not." *Id.* at 1863.

Specifically, plaintiffs had an alternative existing process because they could have brought

– and in fact, in this action, have brought – tort claims under the FTCA. *See Rivera*, 370 F. Supp. at 369-70 (holding that a *Bivens* remedy was precluded because, *inter alia*, "Plaintiff had an available tort remedy under the [FTCA]"); *Abdo v. United States*, No. 18-cv-1622-KMT, 2019 WL 6726230, *7 (D. Colo. Dec. 11, 2019) ("the FTCA and a *Bivens* claim are alternative remedies"); *Turkmen v. Ashcroft*, No. 02-cv-2307, 2018 WL 4026734, *11 (E.D.N.Y. Aug. 13, 2018) (Gold, M.J.) ("I conclude that the availability of a remedy pursuant to the FTCA is sufficient to preclude plaintiffs' *Bivens* claims"); *Abdoulaye v. Cimaglia*, No. 15 Civ. 4921 (PKC), 2018 WL 1890488, at *7 (S.D.N.Y. Mar. 29, 2018) ("Although the *Carlson* court acknowledged the availability of an FTCA remedy before allowing that action to proceed, . . . the *Ziglar* court noted that Carlson, like the other previously approved *Bivens* actions, 'might have been different if [it] were decided today. . . . The Court thus concludes that the existence of the FTCA as a potential remedy counsels hesitation in extending a *Bivens* remedy to Abdoulaye's claims.") (internal citations omitted); *Morgan v. Shivers*, No. 14-cv-7921, 2018 WL 618451, at *5 (S.D.N.Y. Jan. 29, 2018) (Despite the Court's view of the FTCA in *Carlson*, "*Ziglar* indicates that hesitation is nevertheless appropriate today," and "the existence of the [FTCA's] alternative remedial structure is . . . a factor counseling hesitation" in extending *Bivens*.). That plaintiffs' FTCA claim is subject to dismissal for the reasons discussed above is immaterial to the alternative process analysis. *See Rivera*, 370 F. Supp. 3d at 370 (citing *Sanford v. Bruno*, No. 17-cv-5132, 2018 WL 2198759 (E.D.N.Y. May 14, 2018) (Cogan, J.) (The remedies that existed "to address plaintiff's situation here are thus adequate for purposes of determining whether to imply a *Bivens* remedy – even though those remedies did not work in this instance.")).

But even beyond the FTCA, plaintiff had a panoply of alternative processes, in both administrative and judicial fora, to potentially redress their medical and non-medical complaints.

For example, plaintiffs could have sought a variety of equitable remedies in federal court, including a petition for *habeas corpus* relief under 28 U.S.C. § 2241 to challenge the "execution" of their sentences "subsequent to [their] conviction" and to alleviate unconstitutional conditions of confinement. *Carmona v. BOP*, 243 F.3d 629, 632 (2d Cir. 2001); *Sanford*, 2018 WL 2198759, at *6 ("Deprivations of constitutional rights while in custody can generally be addressed by *habeas corpus* relief."). Indeed, as *Abbasi* recognized, the "*habeas* remedy" may "provide [] a faster and more direct route to relief than a suit for money damages." 137 S. Ct. at 1863; *Gonzalez*, 269 F. Supp. 3d at 60 (same).

Plaintiffs also could have moved for "an injunction [or other forms of equitable relief] requiring the warden to bring the prison into compliance" with BOP regulations. *Abbasi*, 137 S.Ct. at 1865.[6] The existence of these and other "form[s] of equitable relief" "usually precludes" courts "from authorizing a *Bivens* action." *Id.*

Further, plaintiffs could have brought claims under New York state law against any culpable federal employee to the extent they claimed that the employee's actions placed them outside the scope of their federal employment. *See Vanderklok*, 868 F.3d at 204 (where the United States does not substitute itself for the individual defendant, "claims against an egregiously erring government employee could not be dismissed on sovereign immunity grounds" and could proceed against the individual in state court); *Rivera*, 370 F. Supp. at 370 ("Plaintiff had some avenues for redress under New York state law . . . [t]he existence of these avenues for redress is a special factor counseling against an implied right of action."). The ultimate success of a potential state law claim is irrelevant to the alternative-process inquiry. *See Vega v. United States*, 881 F.3d 1146,

[6] Notably, the attorneys for some MDC inmates sued last year for injunctive relief in *Federal Defenders of New York v. Fed. Bureau of Prisons*, No. 19-cv-660 (MKB) (SMG) (E.D.N.Y.). While that action was dismissed for failure to state claim on the ground that the Federal Defenders could not sue to vindicate *their clients'* Sixth Amendment rights, the Court made no finding that the prisoners themselves could not pursue such a remedy.

1155 (9th Cir. 2018) ("That Vega's state law claims ultimately failed to satisfy the requirements of [state] law . . . does not mean that he did not have access to alternative or meaningful remedies.") (citing *Minneci v. Pollard*, 565 U.S. 118, 129 (2012)); *Sanford*, 2018 WL 2198759, at *7 (The remedies that existed "to address plaintiff's situation here are thus adequate for purposes of determining whether to imply a *Bivens* remedy —even though those remedies did not work in this instance"). Nor is it relevant whether state law claims or claims brought under the FTCA "provide complete relief." *Bush v. Lucas*, 462 U.S. 367, 387 (1983). "[S]tate remedies and a potential *Bivens* remedy need not be perfectly congruent." *Minneci*, 565 U.S. at 619.

In addition, if dissatisfied with the conditions of their confinement, plaintiffs could have sought recourse through the BOP's Administrative Remedy Program, which is an existing, congressionally-sanctioned remedy to address prisoner concerns. *See* 42 U.S.C. § 1997e(a). The Administrative Remedy Program set forth in the PLRA provides inmates an avenue of relief to address the prison-life related deprivations that are alleged in the Amended Complaint. *See Porter v. Nussle*, 534 U.S. 516, 532 (2002). The PLRA remedy process therefore constitutes an independent alternative existing process that precludes a *Bivens* remedy here. *See Abdo*, 2019 WL 6726230, at *7 (citing *Malesko*, 534 U.S. at 74). "The fact that some alternative remedies do not award monetary damages, or have different procedures, or ultimately do not prove successful, is irrelevant." *Id.* (internal citations omitted).

Importantly, defendants are not required to divine all alternative existing processes, and the Court need not "parse the specific applicability of th[e] web of . . . remedies [available] in [plaintiffs'] circumstances," in order to decline implying a new remedy. *Rivera*, 370 F. Supp. 3d at 371 (quoting *Liff*, 881 F. 3d at 921). So long as plaintiffs had an "avenue for some redress, bedrock principles of separation of powers foreclose . . . new substantive liability." *Malesko*, 534

U.S. at 59; *Rivera*, 370 F. Supp. 3d at 370-71 (holding that availability of potential FTCA claim together with state law claims were "sufficient to counsel hesitation, . . . [and] the Court need not address whether any other special factors counsel hesitation").

The existence of "alternative, existing process" to resolve an issue, whether judicial or non-judicial, "constitutes a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages" under *Bivens*. *Minneci*, 565 U.S. at 125-26. Because Congress provided plaintiffs with avenues to protect their rights, the Court need not – and should not – consider creating a new *Bivens* remedy in this context. "The Supreme Court in *Abbasi* confined *Bivens* to an extremely narrow space, and that space is too narrow to accommodate plaintiffs' [claims here]." *Turkmen*, 2018 WL 4026734, at *14.

Accordingly, this Court should refuse to extend *Bivens* in light of these existing, alternative processes.

D. OTHER SPECIAL FACTORS COUNSELING HESITATION EXIST

The test for identifying a relevant special factor is minimal; "the only relevant threshold – that a factor counsels hesitation – is remarkably low." *Arar*, 585 F.3d at 573. The Supreme Court has instructed that courts should pay heed to these factors before implying a *Bivens* remedy, as creating such a remedy is most often the responsibility of Congress, rather than the courts. "The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress." *Abbasi*, 137 S. Ct. at 1857 (internal citations omitted).

While the existence of alternative existing processes is sufficient, standing alone, to counsel hesitation here (*see Vega*, 881 F.3d at 1153-54), additional special factors counsel against extending *Bivens* to plaintiffs' claims. First, in the 40 years since enactment of the PLRA, Congress has never provided a damages remedy to federal prisoners complaining of constitutional

violations. Its refusal to do so suggests that it "does not want to provide federal inmates with [such a] remedy." *Abdo*, 2019 WL 6726230, *7 (citing *Abbasi*, 137 S.Ct. at 1865 (the absence of congressional action "is itself a [special factor] counseling hesitation")). The fact that Congress enacted the PLRA in 1980, in the wake of the Supreme Court's decision in *Bivens*, *Davis* and *Carlson*, is evidence that Congress had opportunity to evaluate the propriety of such a remedy in the prison context and chose not to do so:

> In enacting the [PLRA], Congress expressly determined to create no new remedy, but merely to preserve such remedies as already existed under federal and state law . . . The fact that Congress chose not to codify, expand or restrict *Bivens* indicates that it sought to address and resolve prisoner claims through an administrative process despite the imperfection of that (or, indeed, any) process.

Sanford, 2018 WL 2198759 at *6 (internal citations omitted); *see also*, *Hoffman v. Preston*, No. 1:16-cv-01617-LJO-SAB (PC), 2019 WL 5188927, *6 (E.D. Cal. Oct. 15, 2019), *report and recommendation adopted*, 2020 WL 58039 (E.D. Cal. Jan. 6, 2020) ("[T]he language and reforms imposed by the PLRA indicate that Congress would not approve an implied damages remedy for the claim presented here.").

In light of Congress' activity in the ensuing decades in the area of prisoners' rights, its refusal to create a damages remedy makes clear its intention that the courts not imply one. "[W]hen Congress fails to provide a damages remedy in circumstances like these, it is much more difficult to believe that 'congressional inaction' was inadvertent." *Abbasi*, 137 S.Ct. at 1862 (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988)); *see Gonzalez*, 269 F. Supp. 3d at 61 (citing *Abbasi*, 137 S.Ct. at 1865) ("Congress has been active in the area of prisoners' rights and its actions do not support the creation of a new *Bivens* claim."). The Supreme Court has instructed that courts "must refrain from creating [a *Bivens*] remedy" where Congress' inaction suggests that it would not approve of a remedy in damages. *Abbasi*, 137 S.Ct. at 1859; *cf. Culver v. Fed. Bureau of*

Prisons, No. 5:18cv160-TKW-HTC, 2019 WL 5298551, *4 (N.D. Fla. Sept. 24, 2019), *report and recommendation adopted*, 2019 WL 5298142 (N.D. Fla. Oct. 18, 2019) ("Congress' refusal to enact a damages remedy for federal prisoners counsels against the Court implying one here.").

Second, creating a *Bivens* remedy in the new contexts that this case presents would require courts to weigh the costs and benefits of litigation over how best to respond to emergent conditions such as the partial power outage that impacted the MDC or address non-emergent medical requests. Expanding *Bivens* to cover plaintiffs' conditions claim also would imply a remedy in damages based on judicial second-guessing of judgments by prison officials in a situation that was undisputedly resolved within one week and where the allegedly unconstitutional actions caused plaintiffs no life-threatening injuries. *See generally* Am. Compl. Indeed, the Complaint does not even allege that any plaintiff suffered any injury that persisted after the emergency abated.[7] *See generally id*. Further, inferring a *Bivens* remedy here would entail an evaluation by the courts as to the wisdom of a free-standing damages cause of action, even in the presence of other remedies, as outlined above, capable of addressing the same conduct. But as the Supreme Court has cautioned, these types of policy and cost-benefit analyses and the judgment calls required to make them are outside of the judiciary's purview, and are most appropriate for Congress to make. *See Bell*, 441 U.S. at 562 ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch . . . .").

The presence of alternative existing processes and other special factors, taken together, counsel decidedly against the Court providing a *Bivens* remedy in the new contexts presented here.

[7] Defendants note that while plaintiffs claim that Williams experienced "anxiety and nightmares . . . for weeks after power was restored," Am. Compl., ¶ 247, unlike the claims in *Carlson*, here, it appears that plaintiffs claim that Williams's symptoms occurred in relation to the prison conditions during the power outage rather than in connection with any pre-existing chronic illness (*e.g.*, psychiatric condition).

See Schweiker, 487 U.S. at 421-22 (special factors considered in the aggregate). Accordingly, the Court should decline to extend *Bivens* to plaintiffs' claims, and dismiss this action.[8]

E. PLAINTIFFS HAVE FAILED TO PLEAD SUFFICIENT PERSONAL INVOLVEMENT OF MAFFEO IN THE ALLEGED CONSTITUTIONAL VIOLATIONS

The allegations of the Amended Complaint fail to carry plaintiffs' pleading burden as to defendant Maffeo under *Bivens*, which requires a plaintiff to plead and prove "that each Government-official defendant, through the official's *own* individual actions, has violated the Constitution." *See Iqbal*, 556 U.S. at 676. "Because the doctrine of *respondeat superior* does not apply in *Bivens* actions, a plaintiff must allege that the individual defendant was *personally involved* in the constitutional violation." *Thomas v. Ashcroft*, 470 F.3d 491, 496 (2d Cir. 2006) (emphasis added). A *Bivens* complaint that does not allege the personal involvement of each defendant is "fatally defective on its face." *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 886 (2d Cir. 1987).

Here, plaintiffs have failed to plead any specific facts alleging that Facilities Manager Maffeo personally violated their constitutional rights. Plaintiffs have made no allegation, for example, that he directly or intentionally caused the January 27, 2019 fire and the resulting partial power outage – nor could they plausibly allege such acts. Instead, plaintiffs base the purported violations on: "knowledge" of MDC's alleged, pre-existing "infrastructure failures," which they ascribe to Maffeo by virtue of statements made by a former Warden and a judge in this district in

[8] Even if the Amended Complaint were to survive the instant motion to dismiss, defendants Quay and Maffeo still would be entitled to dismissal because their actions were protected by qualified immunity. This threshold defense to suit applies with respect to plaintiffs' power-outage-related complaints because it was objectively reasonable for Warden Quay and Mr. Maffeo to believe that their actions, taken in response to a developing, emergent situation, did not violate any clearly established constitutional rights. *See Moore v. Andreno*, 505 F.3d 203, 208 (2d Cir. 2008). For the same reason, qualified immunity applies with respect to plaintiffs Hardy and Williams' medical claims; no clearly established constitutional right is implicated by their non-emergent requests for medical evaluation or medication refills.

proceedings held *after* the fire, *see, e.g.*, Am. Compl., ¶ 23, 43, 49; previous alleged power outages of unidentified duration, *id*., ¶¶ 27-28; temporary heating issues that developed within two weeks before the fire, *id.*, ¶ 32, 44; the alleged failure of the "Individual Defendants and [unidentified] MDC staff [to] effectively handle preexisting temperature regulation problems," *id*., ¶ 50; and their failure to "properly communicate information about the blackout," *id*., ¶ 271. Tellingly, in the 201 paragraphs in the Amended Complaint that plaintiffs devote to the "Unconstitutional and Inhumane Conditions" allegedly suffered by the named plaintiffs, they never once allege the specific involvement of Maffeo in any of the deprivations. *See id*., ¶¶ 57-257. Indeed, contrary to plaintiffs' conclusory allegations, Maffeo, under the supervision of Warden Quay, responded to conditions such as temperature variations in areas where abnormal readings were detected and took steps to remedy them between January 27 and February 3, 2019, when full power was restored.

Likewise, plaintiff has made no allegation that Maffeo took any action or failed to take any action with respect to plaintiffs' medical complaints, or was even aware of their professed need for medical evaluation. *See generally* Dkt. No. 1. Plaintiffs' failure to plead sufficient facts to establish that Maffeo personally violated their constitutional rights requires dismissal of the Amended Complaint as to him. *See Iqbal*, 556 U.S. at 676; *Tyler*, 2016 WL 4186971, at *2; *Johnson v. New York*, No. 11-cv-5186, 2012 WL 5424515, at *2 (E.D.N.Y. Nov. 6, 2012) (Mauskopf, J.); *Adekoya v. Holder*, 751 F. Supp. 2d 688, 695-96 (S.D.N.Y. 2010) (dismissing action for failure to allege personal involvement where complaint simply alleged that defendants were aware of the plaintiff's complaints and medical conditions but failed to provide adequate care).

POINT II

ANY TORT CLAIMS ARE BARRED FOR LACK OF SUBJECT MATTER JURISDICTION

The FTCA provides a limited waiver of the sovereign immunity of the United States for certain torts. *See* 28 U.S.C. §§ 1346(b), 2671-2680. It is well settled that "the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (*quoting United States v. Testan*, 424 U.S. 392, 399 (1976)); *accord Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141 (1972). When the United States waives its immunity from suit, "limitations and conditions upon which the Government consents to be sued must be strictly observed, and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 161 (*quoting Soriano v. United States*, 352 U.S. 270, 276 (1957)); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980) (consent to suit must be "unequivocally expressed"). Accordingly, any suit under the FTCA must strictly comply with the terms and conditions of such waiver. *See Adams v. H.U.D.*, 807 F.2d 318, 321 (2d Cir. 1986) (requirements of 28 U.S.C § 2675(a) must be strictly construed).

A. PLAINTIFFS' FTCA CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES PRIOR TO FILING THEIR COMPLAINT

A plaintiff seeking federal subject matter jurisdiction under the FTCA must first exhaust her administrative remedies by filing a claim with the appropriate agency within two years of the alleged injury. *See* 28 U.S.C. §§ 2401(a), 2675(a). Section 2675(a) of Title 28, United States Code commands that:

> An action shall not be instituted upon a claim against the United States for money damages for . . . personal injury . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed

> shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section . . . .

28 U.S.C. § 2675(a). The claimant may not bring suit in district court on the claim until the claim has been finally denied by the agency in writing, or if the agency has failed to adjudicate the claim within six months of its filing. *See id*. Pursuant to 28 U.S.C. § 2401(b), a tort claim against the United States is "forever barred . . . unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." *See Willis v. United States*, 719 F.2d 608 (2d Cir. 1983);

The Court lacks subject matter jurisdiction when the plaintiff's complaint is filed before administrative remedies have been exhausted – either through a denial of her administrative claim, or after six months without a determination by the agency. 28 U.S.C. 2675(a); *see Hill v. United States*, 14-CV-520 (MKB), 2019 WL 5694016, at *5 (E.D.N.Y. Aug. 6, 2019) (citing *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 82 (2d Cir. 2005)). The Supreme Court has been clear that the exhaustion requirement must be strictly enforced in order to effectuate the sound Congressional policy underlying it. *McNeil v. United States*, 508 U.S. 106, 112 (1993). Thus, the terms of the statute must be strictly construed and courts must dismiss prematurely filed claims. *Id.* at 111-13.

In this regard, the "exhaustion requirement is jurisdictional, and, accordingly, the later denial of an administrative claim cannot cure a prematurely filed action." *McKiver v. Fed. Bureau of Prisons of New York*, No. 17 Civ. 9636 (JMF), 2019 WL 1369460, at *3 (S.D.N.Y. Mar. 26, 2019) (citing *McNeil*, 508 U.S. at 111-13); *Makarova*, 201 F.3d at 113; *see also Marks v. Blount-Lee*, No. 16-CV-3524, 2017 WL 3098094, at *4 (E.D.N.Y. Jul. 20, 2017) (Azrack, J.); *Culbertson v. Cameron*, No. 08-cv-4838, 2010 WL 1269777, *5 (E.D.N.Y. Mar. 30, 2010) (Townes, J.);

Grancio v. De Vecchio, 572 F. Supp. 2d 299, 310 (E.D.N.Y. 2008) (Block. J.); *Tarafa v. BOP MDC Brooklyn*, No. 07-CV-554, 2007 WL 2120358, at *3 (E.D.N.Y. Jul. 23, 2007) (Irizarry, J.).

In this case, plaintiffs Scott and Cerda filed their complaint on February 22, 2019, Dkt. No. 1, naming only then-Warden Herman Quay as a defendant. Plaintiffs filed their Amended Complaint on November 15, 2019, adding plaintiffs Patel, Ak, Hardy and Williams, as well as – for the first time – an FTCA claim. Dkt. No. 29.

As plaintiffs acknowledge, plaintiffs Scott and Cerda did not even file their administrative tort claims (SF-95) with the BOP until April 30, 2019, two months after suit was commenced. Am. Compl., ¶¶ 95, 133. BOP denied their claims on October 31, 2019. *Id.* While plaintiffs fail to plead in the Amended Complaint when or if the remaining plaintiffs filed an SF-95 with BOP, it appears that plaintiff Patel submitted an SF-95 received by BOP on August 23, 2019; plaintiff Ak submitted an SF-95 received by BOP on September 10, 2019; plaintiff Hardy submitted an SF-95 received by BOP on November 18, 2019; and plaintiff Williams submitted an SF-95 received by BOP on December 6, 2019. Declaration of Asiamel Cruz, ¶ 28(c)-(g). None of these claims have been denied, and BOP's time to adjudicate these claims has not yet elapsed. As a result, plaintiffs Patel, Ak, Hardy, and Williams failed to exhaust their administrative remedies prior to the filing of the Amended Complaint, and in consequence, the Court lacks subject matter jurisdiction their FTCA claims.

The government submits that the Court also lacks subject matter jurisdiction over the FTCA claims brought by plaintiffs Scott and Cerda as well. While it is undisputed that plaintiffs Scott and Cerda had exhausted their administrative remedies by the time of the filing of the Amended Complaint, they had not done so at the time of the filing of their original Complaint. Some courts have held that the FTCA requires that subject matter jurisdiction exist at the time of

the filing of that *original* Complaint, even where that Complaint did not assert any FTCA claims. *See Boatwright v. Chipi*, No. CV207-38, 2008 WL 819315, at *15 (S.D. Ga. Mar. 26, 2008); *Lopez v. Chertoff*, No. ED CV 07-1566-RSWL, 2009 WL 395229, at *1-2 (E.D. Cal. Feb. 17, 2009). Indeed, recently, a court in the Southern District of New York held that the FTCA may prohibit relying on an Amended Complaint to cure the jurisdictional defect existing at the time suit was filed. *See McKiver*, 2019 WL 1369460, *3-4 (holding that the government was "on firm ground in seeking dismissal" of claims not exhausted as of the time suit was filed, but declining to reach the question of whether the FTCA precludes establishing jurisdiction through the filing of an amended complaint under different circumstances). There is some disagreement, however, on this issue. *See, e.g.*, *Grancio* 572 F. Supp. 2d at 310 (holding that an amended complaint may establish jurisdiction where, *inter alia*, the FTCA is not invoked in the initial complaint).

In sum, it is beyond dispute that the Court lacks jurisdiction over the FTCA claims brought by plaintiffs Patel, Ak, Hardy, and Williams because the Amended Complaint was filed before they exhausted their administrative remedies. *See* 28 U.S.C. 2675(a); *Celestine*, 403 F.3d at 82. Further, defendants submit that the FTCA requires jurisdiction to exist at the time of the filing of the original Complaint, depriving the Court of jurisdiction over all plaintiffs' FTCA claims.[9]

B. THE DISCRETIONARY FUNCTION EXCEPTION IN 28 U.S.C. § 2680(a) ACTS AS A JURISDICTIONAL BAR TO PLAINTIFFS' CLAIMS

Even assuming plaintiffs had satisfied the exhaustion requirement of the FTCA, plaintiffs' claims still would be jurisdictionally barred by application of the second clause of 28 U.S.C. §

[9] Because plaintiffs could file a separate action after exhausting remedies, assuming such an action were timely, it makes little sense to proceed here on claims for which the Court lacks jurisdiction. *See Tarafa*, 2007 WL 2120358, at *3 (the Court is "compelled" to dismiss the complaint for lack of jurisdiction even though it seems "form over substance"). For this reason, prior to plaintiffs filing their Amended Complaint, counsel for the government suggested that plaintiffs file a related, but separate, FTCA complaint upon exhausting the administrative process. Plaintiffs declined to do so.

2680(a), the FTCA's Discretionary Function Exception ("DFE").

1. The Discretionary Function Exception Generally

The FTCA's limited waiver of sovereign immunity does not authorize claims against the United States based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused. *See* 28 U.S.C. § 2680(a). The DFE marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals; it is, moreover, intended to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *United States v. Varig Airlines*, 467 U.S. 797, 808, 814 (1984); *see also, Berkovitz v. United States*, 486 U.S. 531, 536 (1988). That boundary is found where official acts of discretion implement agency policies and programs. Where there is room for policy judgment and decision, there is an exercise of policy discretion that is protected by the DFE. *See Dalehite v. United States*, 346 U.S. 15, 35-36 (1953).

When the DFE applies, the government has elected not to waive its immunity, and courts lack subject matter jurisdiction. *See O'Toole v. United States*, 295 F.3d 1029, 1033 (9th Cir. 2002). A court's determination of whether the DFE shields the government from liability involves a two-step analysis. Courts look to the framework established in two seminal Supreme Court cases: *Berkovitz*, 486 U.S. at 531, and *Gaubert*, 499 U.S. at 315. "According to the *Berkovitz-Gaubert* test, the discretionary function exception bars suit only if two conditions are met: (1) the acts alleged to be negligent must be discretionary, in that they involve an 'element of judgment or choice' and are not compelled by statute or regulation and (2) the judgment or choice in question

must be grounded in 'considerations of public policy' or susceptible to policy analysis." *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000); *see, e.g.*, *Berkowitz*, 486 U.S. at 536; *Gaubert*, 499 U.S. at 323.

In addition to the fact that the DFE covers conduct that involves "an element of judgment or choice," *Berkovitz*, 486 U.S. at 536, "it is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies. *Varig Airlines*, 467 U.S. at 813. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S., at 536; *see Gaubert*, 499 U.S. at 325 (DFE shielded decisions made at operational and management level of agency). Nevertheless, the DFE will bar a plaintiff from recovery even where an employee abused his discretion or was negligent in the performance of a discretionary function. *See Dalehite*, 346 U.S. at 39; *In re: Agent Orange Product Liab. Litig.*, 818 F.2d 210, 215 (2d Cir. 1987); *Taveras v. Hasty*, No. 02-CV-1307, 2005 WL 1594330 (E.D.N.Y. Jul. 7, 2005) (Trager, J.). The fact that the governmental actor may negligently exercise his or her discretion in making a decision is irrelevant to the analysis regarding the applicability of the DFE. Indeed, the exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Thus, negligence is not an issue in the discretionary function analysis. *See Baum v. United States*, 986 F.2d 716, 722, n.2 (4th Cir. 1993).

2. <u>The DFE Bars Plaintiffs' Tort Claims</u>

As a preliminary matter, before the Court applies the two-prong DFE analysis, it must first undertake the "crucial first step" of framing properly the conduct at issue. *Rosebush v. United States*, 119 F.3d 438, 441 (6th Cir. 1997). In this regard, "Courts must avoid framing the conduct

simply as the failure to exercise due care because such a narrow characterization collapses the DFE inquiry into the question of whether the defendants were negligent, and negligence is irrelevant to the DFE." *Stanford v. United States*, 992 F. Supp. 2d 764 (E.D. Ky. 2014) (citing *Rosebush*, 119 F.3d at 442). "Similarly, an overly broad characterization risks insulating all conduct from liability, because at a high enough level of generality, everything is discretionary." *Id.*

Here, this crucial first step requires a degree of speculation because plaintiffs fail to allege with any specificity the negligent conduct at issue. Instead, plaintiffs set forth a laundry list of alleged failures ranging from those that would not suffice as the basis of a negligence claim under New York law to those that could constitute negligence but fall under the DFE. Am. Compl., ¶¶ 301-27. Plaintiffs summarily conclude that these are "acts and omissions" that constitute negligence. Am. Compl., ¶ 375.

For the purposes of this motion, defendants have construed plaintiffs' negligence claim as: (1) MDC staff failed to prioritize needed infrastructure maintenance ahead of the January 27 fire (Am. Compl., ¶¶ 49-50, 301-03); (2) Warden Quay erred when he declined to order an evacuation of the West Building of MDC Brooklyn after the fire (Am. Compl., ¶ 307(e)(ix)); (3) Warden Quay and other BOP staff improperly managed the facility during the resulting partial power outage (Am. Compl., ¶ 307(e), generally); and (4) Maffeo failed to properly hire and supervise the contractors responsible for conducting repairs and ensuring that the repairs were completed as quickly as possible (Am. Compl., ¶ 307(d)). All of these allegations of negligence are precluded by the DFE.[10]

To the extent plaintiffs claim that BOP staff were negligent in marshaling their resources to address heating and electrical systems at the MDC, leading to a situation where an electrical fire

[10] To the extent plaintiffs argue in opposition to this motion that their negligence claim is based on theories not analyzed here, the government reserves its right to address those theories in its reply memorandum.

and/or heating disruptions were inevitable, these decisions fall squarely within the ambit of the DFE because the balancing of personnel and maintenance resources is both discretionary and subject to policy analysis. The decisions regarding maintenance of a BOP facility involves "decisions that [are] left to the discretion of prison officials." *Fernandini v. United States*, 15 Civ. 3843 (GHW), 2019 WL 1033797, at *4 (S.D.N.Y. Mar. 5, 2019). This is so because BOP's statutory mandate "to provide for the safekeeping, care, and subsistence of all persons" in their custody does not define how "the Bureau of Prisons should accomplish the goal…" *Id.* at *4 (quoting 18 U.S.C. § 4042(a)(2)). Further, in *Fernandini*, the district court held that the "prison officials' day-to-day decisions at issue here—regarding prison population, facility maintenance…fall within the scope of the discretionary function exception. *These are not the type of determinations that a federal court should second guess*." *Id.* at *5 (emphasis added).

The deployment of MDC maintenance staff, the prioritization of capital issues, and the hiring of contractors to address maintenance issues are all "practical considerations" relating to "staffing and funding" that constitute policy-based judgments. *Varig Airlines*, 467 U.S. at 820. In other words, decisions on how to utilize the limited resources allocated to maintain a BOP facility is exactly the kind of discretionary decision, grounded in public policy considerations, that is protected from second guessing through an FTCA claim. As such, these actions fall within the umbrella of the DFE.

Similarly, Warden Quay's decision not to evacuate the West Building after the electrical fire and power outage falls squarely within the DFE. There is no BOP policy that mandates an evacuation after an electrical fire – indeed the OIG Report found that "MDC[ ] management followed relevant protocols defined in the MDC['s] Fire Contingency Plan[,]" involving, among other things, verifying the safety of inmates. OIG Report, pp. 22-23. In considering the

operational and security challenges presented by the facility issues, Quay chose not to evacuate the facility. As noted by the acting BOP Director in the OIG Report, evacuating a facility is an "option of absolute last resort" because it impacts a wide variety of core prison capabilities, including safety, and even facilitating the inmates' attendance at court hearings. OIG Report, pp. 26-27. Though plaintiffs may second guess the wisdom of that decision, it cannot seriously be contested that the choice that was made was grounded in policy considerations and is subject to policy analysis.

Indeed, it is exactly for these reasons that the Fifth Circuit Court of Appeals affirmed the dismissal of an FTCA a claim stemming from the decision of BOP's South Central Regional Director not to evacuate a BOP facility in Texas in the aftermath of Hurricane Rita in 2005. *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010). In *Spotts*, the Federal Correctional Complex in Beaumont, Texas sustained a direct hit from Hurricane Rita, a category 5 storm resulting in extremely dire conditions at the facility. *See* 613 F3d at 563-65. The complex's low and medium-security facilities were evacuated, while the high-security facility was not – the high security inmates had to live with the dire conditions for 36 days. *Id.* at 563. During this time, the facility was entirely without power. *Id.* at 564. Making matters worse, a heat wave simultaneously swept the region and the temperature exceeded 90 degrees for 23 of those days, even exceeding 100 degrees on 16 days, with temperatures inside the prison often reaching "much higher." *Id.* As described in the Fifth Circuit's decision affirming dismissal, "[f]loor wax melted; the cement and brick walls sweated; within a few days after the storm, the moisture developed into a slimy black mold." *Id.* During this time, inmates did not have access to medical care – even diabetics did not get their insulin. *Id* Inmates were unable to shower until two weeks after the power outage. *Id.* Also, the toilet facilities were not functioning properly -- the inmates were forced to endure an

overpowering smell in "stagnant" air and, on occasion, relieve themselves in plastic bags, which were not collected by the guards. *Id.* Further, for several days in a row, the inmates "received no food at all from the guards," and when food was provided, it consisted of "moldy bread" and "spoiled meat." *Id*. Ultimately, the Fifth Circuit found that the decision not to evacuate the prison met both prongs of the *Berkovitz* test and that the discretionary function exception applied. *Id.* at 573.[11]

As in *Spotts*, here, Warden Quay's decision not to evacuate inmates from the West Building falls within the DFE. In reaching his decision, Warden Quay had to exercise his discretion to balance a host of factors, including: the expected duration of the evolving partial power outage, the livability of the West Building, the burdens on the inmates, the delays that may accrue to their criminal proceedings, and the safety and security of not only staff and inmates at the MDC, but the general public. OIG Report, pp. 26-27.

Similarly, MDC staff's decisions regarding inmate management during the period at issue, including the use of periodic lockdowns, what materials to distribute to inmates, the process to distribute meals, and how to provide medical resources to inmates in the presence of facility limitations are discretionary choices subject to policy analysis because they impact important policy and security challenges related to the safe operation of the institution.[12] *See, e.g.*, *Hartman v. Holder*, No. 00-CV-6107, 2005 WL 2002455, at *11-12 (E.D.N.Y. Aug. 21, 2005) (Gleeson, J.)

[11] Unlike here, the plaintiffs in *Spotts* did not allege a violation of their constitutional rights as part of their case. *Spotts*, 613 F.3d at 569-570. To be clear, the government does not argue that the DFE insulates its employees from liability for unconstitutional conduct. However, the allegations at issue in the FTCA claim purport to sound in negligence only.

[12] A claim for medical malpractice as to a particular plaintiff's medical care would not fall within the DFE. However, as described above, plaintiffs only allege a general inadequacy of medical services. To that end, plaintiffs rely on unattributed allegations about non-parties' medical conditions to support a general claim that medical care is inadequate. Am. Compl., ¶¶279-80.

(holding that Warden's policy regarding razor distribution falls under the DFE because it implicated important security questions).

Finally, plaintiffs appear to claim that MDC staff failed to repair the damage caused by the fire as quickly as possible. Am. Compl., ¶ 301(d). In support of this theory, plaintiffs highlight a comment by Representative Jerrold Nadler that on a Friday afternoon, contractors had already stopped working, resulting in the power outage lingering over the weekend. *Id.* But, as discussed earlier regarding plaintiffs' claims of negligent maintenance of the facility, BOP's determinations to hire certain contractors, to retain or discharge them, and how to supervise those contractors cannot form the basis of tort liability against the government.

It is well-established that claims of negligent hiring, training, supervision, and retention on the part of federal officials fall squarely within the DFE. Courts have noted that "[t]he hiring decisions of a public entity require consideration of numerous factors, including budgetary constraints, public perception, economic conditions, 'individual backgrounds, office diversity, experience and employer intuition.'" *Burkhart v. Washington Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997). Since hiring decisions require the weighing of a variety of competing policy interests, these decisions are the type of decisions which Congress intended to protect with the DFE from judicial second-guessing. *Saint-Guillen v. United States*, 657 F.Supp.2d 376, 386-387 (E.D.N.Y. 2009) (Irizarry, J.)(citing *Burkhart*); *Li v. Aponte*, No. 05 Civ. 6237(NRB), 2008 WL 4308127, at *8 (S.D.N.Y. Sept. 16, 2008). As such, any such negligence claims in this regard must be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss and grant such other and further relief as the Court may deem just and proper.

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